Supreme Court, U.S.
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No. 96-625

In the

Supreme Court of the United States

October Term, 1996

JACK L. DOAN,

Petitioner,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

ROBERT S. FURR, LESLIE WOOSLEY, and BERNARD E. OZINGA,

Petitioners,

vs.

SEAGATE TECHNOLOGY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Although petitioners list four issues, their arguments center upon one basic question:

1. Whether employment discrimination cases are a special class of cases such that judgment as a matter of law may never be granted.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. The respondent has no parent companies or subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Seagate Technology, Inc. ("Seagate"), hereby opposes the petition for a writ of certiorari filed by petitioners in the captioned cases, and requests that the petition be denied.

STATEMENT OF THE CASE

Seagate designs, manufactures and markets hard disc drives for computer systems. In 1991, at the time of the

reduction in force ("RIF") in which petitioners were included, Seagate had plants in 17 countries and approximately 30,000 employees worldwide. (Furr, R. Vol. III 502.)

Seagate's senior worldwide management met every month for operational meetings to review business issues. (Furr, R. Vol. III 500-501.) In the June, 1991 meeting, senior management decided that certain cost-containment adjustments would have to be made to address a forecasted depression in its profit margins. (Furr, R. Vol. III 501, 520; Doan, R. Vol. II 72-73; Vol. III 478-481, 493-495.) These adjustments included reducing scrap costs, consolidating customer service and repair operations, refocusing the sales force, not paying profit-sharing at that time and conducting a RIF. (Furr, R. Vol. III 501-502, 518, 520; Doan, R. Vol. II 72-73, 85-86; Vol. III 478-479, 492-495.) The RIF was a strategic business decision aimed at improving Seagate's position in the highly competitive and volatile computer hard disc drive business. (Furr, R. Vol. III 499-500, 505, 507-509; Doan, R. Vol. II 72-73; Vol. III 476-488, 492-495.)

The initial RIF occurred during July, 1991, with a second smaller RIF in August. (Furr, R. Vol. IV 733-734.) Approximately 1,200 employees were laid off nationwide. (Furr, R. Vol. III 503; Doan, R. Vol. III 481.) Fifty-four employees from Oklahoma City were laid off. (Furr, R. Vol. III 503.)

The petitioners were laid off from the Oklahoma City facility. Each petitioner was selected for the RIF by his supervisor based on job elimination and performance. (Furr, R. Vol. III 564; Vol. IV 612, 664-666, 670, 677; Vol. V 1040; Doan, R. Vol. III 317-334, 536-550.) Each of the petitioners in Furr admitted that their supervisors would not intentionally

discriminate against them. (Furr, R. Vol II 194; Vol. III 345; 438-439.)

In their statement of the case, petitioners grossly misstate the evidence they offered at trial. In its first proposition, respondent specifically discusses the misstatements made by petitioners regarding the only area of evidence petitioners rely upon in support of their petition.

REASONS FOR DENYING THE PETITION

1. In their first proposition, petitioners assert there is an "emerging trend" to restrict the jury's function in employment discrimination cases by granting judgment as a matter of law ("JMOL"). Petitioners incorrectly state that the Seventh and Eleventh Circuits deny juries the right to disbelieve the testimony of an interested party and require juries to accept an employer's proffered legitimate, nondiscriminatory reason for an employment action unless there is direct evidence contradicting the employer's stated reason, while the Third and Fifth Circuits follow a different rule. Petitioners also mischaracterize the Tenth Circuit's opinions in these cases as following the Seventh Circuit's approach "in principle." Petitioners' argument is nothing more than a transparent attempt to manufacture a split in the circuits, and to gratuitously include the Tenth Circuit in the split.

The Seventh and Eleventh Circuits do not have a special rule regarding the jury's ability to judge witness credibility. Petitioners cite only one case from these circuits in which appellate review of a jury's right to judge the credibility of witnesses was even discussed, Futrell v. J. I. Case, 38 F.3d 342

(7th Cir. 1994).[1] In Futrell, the case on which petitioners' entire argument hinges, the court stated:

> In reviewing the sufficiency of the evidence in indirect discrimination cases, we do not defer to jury verdicts where the credibility of a defendant's explanation of the discharge is at issue simply because juries have the exclusive right to judge credibility."

Id. at 346.[2]

The portion of Futrell quoted and relied upon by petitioners is consistent with cases from this Court. In Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216-18 (1931), also cited by petitioners, the Court stated:

> We recognize the general rule. . .that the question of the credibility of witnesses is one for the jury alone; but this does not mean that

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[1]Collier v. Budd Co., 66 F.3d 886, 893 (7th Cir. 1995), cited by petitioners, merely states that an employee cannot defeat a motion for summary judgment simply by asserting that he was qualified for his position, but rather must offer specific evidence from which the jury may reasonably infer that the proffered reasons are not true. In Howard v. BP Oil Co., 32 F.3d 520, 526 (11th Cir. 1994), the Eleventh Circuit stated that a plaintiff may not withstand summary judgment by merely denying a defendant's credibility but must produce "sufficient evidence to allow a reasonable finder of fact to conclude that the defendant's articulated reasons for its decision are not believable." In Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 84 F.3d 1380 (11th Cir. 1996), the court reiterated that the employee must present *evidence* calling into question the veracity of the employer's proffered legitimate nondiscriminatory reason for an employment action.

[2]Petitioners fail to note that the Seventh Circuit in Futrell reversed a grant of judgment as a matter of law for the defendant and reinstated the jury verdict in the plaintiff's favor.

> the jury is at liberty under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. . . .The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. . . .[W]e are of opinion that this was not enough to take the question to the jury, and that the court should have so held.
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> * * *
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> "Generally, the credibility of a witness who is a party to the action, and therefore interested in its result, is for the jury; but this rule, being founded in reason, is not an absolute and inflexible one. Where. . .the evidence of a party to the action is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness."

See also Pence v. United States, 316 U.S. 332, 340 (1942) (evidence did not serve to contradict, qualify or explain party's admissions); Neely v. Eby Construction Co., 386 U.S. 317 (1967) (appellate court has discretion to enter judgment notwithstanding the verdict); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (affirming circuit court's entry of judgment notwithstanding the verdict on plaintiff's anti-trust claim); United States v. Generes, 405 U.S. 93, 106-107 (1972) (the Court itself granted judgment notwithstanding the verdict, thereby determining a case in which the central

issue was a taxpayer's motivation); A. B. Small Co. v. Lamborn & Co., 267 U.S. 248, 254 (1925).[3]

The cases cited by petitioners from the Fifth and Third Circuits are not in conflict with the Seventh or Eleventh Circuit cases, or the instant cases. In Lloyd v. Georgia Gulf Corp., 961 F.2d 1190 (5th Cir. 1992) and Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461 (5th Cir. 1989), *cert. denied*, 493 U.S. 842 (1989), the Fifth Circuit upheld jury verdicts for employees after examining the evidence and noting that the employers did not produce any documentation to support their stated reasons for the adverse employment action. The Third Circuit in Bhaya v. Westinghouse Elec. Corp., 832 F.2d 258 (3rd Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989), reviewed the evidence and found sufficient evidence to support the jury's verdict for the plaintiff. In these cases, as in Futrell, the courts reviewed the evidence before determining its sufficiency to support a verdict of discrimination.[4]

The Court should not grant certiorari without an actual conflict in the circuits. Further, even if the few cases cited by petitioners were viewed as conflicting, this does not represent a fully developed legal issue for the Court to consider.

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[3]Of the three cases cited by petitioners to argue that a case must be submitted to a jury if a witness has an interest in the suit, two pre-date Chesapeake. See Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401 (1899); Ætna Life Ins. Co. v. Ward, 140 U.S. 76 (1891). The third, Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620 (1944), dealt with credibility determinations at the summary judgment stage.

[4] The last case cited by petitioners, Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994), also is inapposite. The court stated that a plaintiff must produce evidence casting substantial doubt on a fair number, not all, of the legitimate, non-discriminatory reasons proffered by the employer, to avoid summary judgment. Fuentes, 32 F.3d at 764 n. 7.

Additionally, petitioners grossly mischaracterize the Tenth Circuit as holding that a jury may not disbelieve the testimony of an employer's witness and is bound to accept an employer's proffered legitimate, nondiscriminatory reason unless there is direct evidence to the contrary. Nowhere in its opinions in these cases did the Tenth Circuit explicitly or implicitly make such a statement or finding. Instead, after a careful and thorough review of the record, the Tenth Circuit determined that even in the light most favorable to them, the petitioners had failed to produce evidence sufficient to carry their burden of proving intentional age discrimination. Doan v. Seagate Technology, Inc., 82 F.3d 974, 979 (10th Cir. 1996); Furr v. Seagate Technology, Inc., 82 F.3d 980, 988 (10th Cir. 1996).[5]

Although mere error is not a compelling reason to grant certiorari, petitioners' argument that the decision below was incorrect because the Tenth Circuit misinterpreted the evidence concerning salary forecast documents must be addressed.[6] Respondent used salary forecasts solely for the purpose of forecasting employee raises for the next fiscal year. (Furr, R. Vol. II 109-110, 171; Vol. III 560-561; Vol. IV 622, 634, 679, 758, 770; Doan, R. Vol. 345, 398-399.) At trial, petitioners argued that the salary forecasts were based on the same criteria used in the RIF, and contended that the employees listed last on the forecasts should have been laid off first. The Tenth Circuit recognized that petitioners' argument was not supported by the

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[5]The other two Tenth Circuit cases cited by petitioners, Prochuska v. Marcoux, 632 F.2d 848 (10th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981), and Madison v. Desert Livestock Co., 574 F.2d 1027 (10th Cir. 1978), do not stand for the proposition urged by petitioners. In these cases, the Tenth Circuit merely stated that credibility determinations are not proper at the summary judgment stage.

[6]This was the only evidence the petitioners argued the Tenth Circuit misinterpreted.

evidence and was, therefore, insufficient as a matter of law to establish age discrimination.

In Furr, the Tenth Circuit noted that petitioners' own witness admitted the salary forecasts failed to take into account the possibility of position elimination, which was Seagate's first RIF criteria. (Furr, R. Vol. II 120). The Tenth Circuit also recognized that petitioners relied on salary forecasts which combined several departments, ignoring the uncontroverted evidence that managers were only allowed to select employees from their own departments. (Furr, R. Vol. II 312-13; Vol. III 53-455; Vol. IV 690; Vol. V 971, 974, 980, 982-1034.) The salary forecasts for each petitioner's individual department showed that petitioners were ranked lowest of those similarly situated in their departments. (Furr R. Vol. II 209-210; Vol. III 447 Vol. V 971). According to their own theory, petitioners should have been selected for the RIF if the salary forecasts had been used.

Finally, petitioners argued that on the salary forecasts five managers[7] were "ranked" in order of age. Petitioners contended that this showed discrimination because the managers who selected petitioners would have followed the lead of their manager. Such rank speculation, however, is insufficient to support a jury verdict. As the Tenth Circuit noted, age was not listed on the ranking and petitioners produced no evidence that age was a factor in the rankings. (Furr, R. Vol. IV; 634-635; Vol. V 971, 924, 1037). Further, petitioners' argument was not even correct. (Furr, R. Vol. IV 682-684, 742-743.) The Tenth Circuit also noted petitioners' own testimony that they did not believe their managers, who undisputedly selected them for layoff, would intentionally

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[7]None of these managers were laid off.

discriminate against them on the basis of age. (Furr, R. Vol. II 194, 202-204, 256-257, 337; Vol. III 354, 438-439).

In Doan, the petitioner alleged that his manager "deviated" from the salary forecast documents in order to select him for the RIF because he was not the last person listed on the salary forecast for the year of the RIF. As the Tenth Circuit noted, however, this did not constitute probative evidence of discrimination because the undisputed documentary evidence showed that it had been Doan's supervisor's regular practice for a number of years to list new employees below other employees on the salary forecasts. (Doan, R. Vol. III 347, 349, 352, 557-558). Thus, a reasonable jury could not have concluded that listing new employees below Doan on the salary forecasts in the year of the RIF was evidence of age discrimination.

As stated in Chesapeake, the Tenth Circuit was not required to overlook uncontradicted evidence supporting the respondent's witnesses' testimony simply because a jury generally determines the credibility of the witnesses. The testimony of the employer's witnesses on the salary forecasts was uncontradicted by any other witness, supported by petitioners' witness and consistent with the documentary evidence. The Tenth Circuit did not deny the jury the right to disbelieve the employer's witnesses, as petitioners argue. Rather, the Tenth Circuit fulfilled its duty under Fed.R.Civ.P. 50, and concluded that the evidence was insufficient as a matter of law to prove intentional age discrimination.

Petitioners' real argument is that an appellate court should be absolutely precluded from granting JMOL in employment discrimination cases. The absurdity of petitioners' underlying argument is exposed when the basic rationale for the indirect method of proof in discrimination cases is considered:

> The standards for granting summary judgment, a directed verdict, and a judgment notwithstanding the verdict ("JNOV") are essentially the same; all of these motions "call upon the court to make basically the same determination -- that there is no genuine issue of fact and that the moving party is entitled to prevail as a matter of law." Wright & Miller *Federal Practice and Procedure* Section 2713.1 at 613, Section 2537 at 599 (1983). If we could never reverse a jury verdict for the plaintiff in an "unworthy of credence" claim on the ground of insufficiency of the evidence, then a district court could never grant summary judgment or a directed verdict for the employer; in every claim, the jury would have to be given its opportunity simply to disbelieve the employer. This result does not follow from *Burdine* and would overrule the basic requirement that a jury verdict be supported by "substantial" evidence. The purpose of *Burdine* was not to allow plaintiffs to go to the jury without presenting any evidence at all; its purpose was to allow plaintiffs to prove discrimination without presenting any evidence of *discrimination*, and solely with evidence of pretext. Furthermore, such a holding would be perverse. Cases based on indirect and circumstantial evidence of pretext should not be less subject to dismissal for insufficiency than cases based on evidence which is *more* probative of discrimination.

Perfetti v. First National Bank of Chicago, 950 F.2d 449, 452 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 2995 (1992); see also

Newell Companies, Inc. V. Kenney Mfg. Co., 864 F.2d 757, 763 (Fed. Cir. 1988) ("a party has a right to a *jury trial* in an action at law, not a right to a *jury verdict* [; a] jury verdict need not be obtained and may be set aside under the common law principles incorporated into the Constitution where there is no fact issue for the jury to decide."), *cert. denied*, 493 U.S. 814 (1989); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 659 (1935) (whether evidence is sufficient to support a verdict for a plaintiff is a question of law to be resolved by the court).

Petitioners' arguments in their first proposition do not provide a basis for granting certiorari.

2. In their second proposition, petitioners claim that a conflict exists among the circuits as to the *prima facie* case in RIF cases. Petitioners fail to explain the perceived conflict. It is this: In a RIF case, whether a plaintiff is required to come forward with additional evidence that his protected characteristic was a factor in his termination in order to establish a *prima facie* case. The Eighth Circuit follows this approach. See Bialas v. Greyhound Lines, Inc., 59 F.3d 759 (8th Cir. 1995). Petitioners contend that this formulation of the plaintiff's prima facie case conflicts with other circuits. In the cases cited by petitioners, Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) and Marzano v. Computer Science Corp. Inc., 91 F.3d 497 (3rd Cir. 1996), it was held that at the *prima facie* stage a plaintiff is not required to produce some additional evidence that he was singled out for discharge because of his protected status. These cases found that the fourth element of the *prima facie* case was satisfied by showing that persons not in the protected class were retained (i.e., treated more favorably). Oxman, 846 F.2d at 455; Marzano, 91 F.3d at 507.

In the instant cases, respondent admitted that petitioners met their initial burden of proving a *prima facie* case. Furr, 82 F.3d at 985; Doan, 82 F.3d at 976. Consequently, whether or not a conflict exists as to the proper formulation of a plaintiff's *prima facie* case is fundamentally irrelevant to this case. These cases were decided on "'the single overarching issue whether [petitioners] adduced sufficient evidence to warrant a jury's determination that adverse employment action was taken against [them] on the basis of age.'" Furr 82 F.3d at 985; Doan, 83 F.3d at 977.

Detracting even more from petitioners' argument is the fact that the Tenth Circuit follows the Third and Seventh Circuits approach -- the one petitioners argue is correct. To establish a *prima facie* case in the context of a RIF, the Tenth Circuit merely requires a plaintiff to show that persons not in the protected class were treated more favorably. See Rea v. Martin-Marietta Corp., 29 F.3d 1450, 1454 (10th Cir. 1994); Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994). Consequently, petitioners' contention that the Tenth Circuit followed the "additional evidence approach" is without merit. See Petition at 15. Moreover, the portion of the Tenth Circuit's opinion in Furr to which petitioners cite in support of this argument deals with petitioners' ultimate burden of proof, not whether petitioners established a *prima facie* case.[8]

It also should be noted that petitioners' argument misconstrues the employers' burden, which is one of production only. St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747

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[8]Petitioners' quote on page 15 of their petition also is only a partial quote from Furr. The remainder of the sentence states that petitioners did not show that the departments were selected because of age. Petitioners do not cite any portion of Doan in this proposition.

(1993). Petitioners retain the ultimate burden of proof at all times. Id. Here, contrary to petitioners' contention, respondent fully satisfied its burden of production as to its legitimate nondiscriminatory reasons for terminating petitioners' employment. Seagate presented evidence that petitioners were laid off because of a company-wide RIF, and that they were selected for layoff by their managers using the RIF criteria.

Petitioners' argument concerning the *prima facie* showing required in RIF cases is irrelevant to anything in the instant cases. To the extent that a conflict exists concerning the proper formation of a *prima facie* case, the Court, and all litigants, would be better served by the Court waiting for a case that actually involves such a conflict. Only then will the legal issues be properly developed with a full evidentiary background for the Court's consideration. Accordingly, certiorari should be denied.

3. In proposition three, petitioners query whether the standard for JMOL as set forth in Lavender v. Kern, 327 U.S. 645 (1946), a case under the Federal Employers' Liability Act ("FELA"), is limited to FELA and Jones Act cases or whether it applies more broadly. Petitioners, however, never raised this issue in the proceedings below. They cannot raise it for the first time to this Court. See Kosak v. United States, 465 U.S. 848, 865 n.3 (1984) ("Because petitioner did not present this argument to the Court of Appeals, we decline to consider it.").

Indeed, in their answer briefs to the Tenth Circuit, petitioners set forth the following quote from EEOC v. Prudential Federal Sav. and Loan Ass'n, 763 F.2d 1166, 1171 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985), as embodying the applicable standard for JMOL:

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable interferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.,** 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.,** and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.,** 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

Doan Corrected Answer Brief at A-2; Furr Corrected Answer Brief at A-6. Petitioners cannot now argue that a purportedly more stringent JMOL standard should have been applied by the Tenth Circuit.

Assuming, *arguendo*, that petitioners can raise this issue, the question presented does not require the exercise of the Court's extraordinary and discretionary jurisdiction. In essence, petitioners are asking this Court for guidance in formulating the proper standard for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Such guidance has been given by this Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986):

The petitioners suggest, and we agree, that this standard [the standard for summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. Brady v. Southern R. Co., 320 U.S. 476, 479-80, 88 L.Ed. 239, 64 S.Ct. 232 (1943). If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. Wilkerson v. McCarthy, 336 U.S. 53 (1949). As the Court long ago said in Improvement Co. v. Munson, 14 Wall 442, 448, 20 L.Ed. 867 (1872), and has several times repeated:

> "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that it there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence

> is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Footnotes omitted.)

See also Pleasants v. Fant, 22 Wall 116, 120-121, 22 L.Ed. 780 (1875); Coughran v. Bigelow, 164 U.S. 301, 307, 41 L.Ed. 442, 17 S.Ct. 117 (1896); Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333 (1933).

Anderson fully answers the question as to the standard to be applied in deciding motions for judgment as a matter of law. Petitioners make no showing as to why this Court should answer it again.

The JMOL standard set forth in Anderson is the standard the Tenth Circuit applied in the instant cases. Further, this is the same standard routinely applied by the circuit courts in employment discrimination cases. See Von Zuckerstein v. Argonne Nat'l Laboratory, 984 F.2d 1467, 1471 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 419 (1993); Thomure v. Phillips Furniture Co., 30 F.3d 1020, 1022 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1255 (1995); Phelps v. Yale Security, Inc., 986 F.2d 1020, 1023 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 175 (1993); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1095 (3rd Cir. 1995); Martin v. Cavalier Hotel Corp., 48 F.3d 1343, 1350 (4th Cir. 1995); Molnar v. Ebasco Constructors, Inc., 986 F.2d

115, 117-118 (5th Cir. 1993); Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 716 (1st Cir. 1994); Ebrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1469 (11th Cir. 1994). Petitioners' contention that an allegedly more stringent JMOL standard should be applied in employment discrimination cases is clearly without any legal basis. Certiorari, therefore, should be denied.[9]

4. In proposition four, petitioners raise the issue whether, under the Seventh Amendment, a court of appeals is required to explain why it did not grant a new trial when it sets aside a jury's verdict due to insufficient evidence. The question raised by petitioners has already been answered by this Court. Certiorari, therefore, should be denied.

Under the very case relied upon by petitioners, Neely v. Eby Construction Co., 386 U.S. 317 (1967), it is clear that the Tenth Circuit was not required to explain the reasoning behind its denial of petitioners' motions for new trials. In Neely, the Court addressed whether an appellate court, after reversing the trial court's denial of a defendant's motion for judgment notwithstanding the verdict, may itself direct the trial court to dismiss the action due to insufficient evidence. The Court held that such a dismissal was within the appellate court's power and did not violate the Seventh Amendment. Id. Petitioners' statement that it "is not completely clear" that JMOL based on insufficiency of the evidence is permissible under the Seventh

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[9]Petitioners' contention that under any standard JMOL was improper is without merit, as fully explained in the Tenth Circuit's opinions. In any event, misapplication of a properly stated rule of law is not a proper basis for certorari. Such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

Amendment is incredible as this was the unmistakable holding of Neely.

Neely does not set forth any *per se* requirement that an appellate court explain its rationale for not granting a new trial when JMOL is granted on appeal, nor is this the "logical extension" of Neely as petitioners contend. If anything, Neely supports the proposition that an appellate court is *not* required to even expressly deal with the new trial issue let alone explain its basis for not granting a new trial. As the Neely Court stated: "But we will not assume that the court ignored its duty in this respect, although it would have been better had its opinion expressly dealt with the new trial question." Id. at 330.

Petitioners are, in essence, asking this Court to assume that the Tenth Circuit ignored its duty to consider their request for a new trial. As stated in Neely, this Court will not make such an assumption. Further, such an assumption is disproved by the record below. The Tenth Circuit, in its Order filed August 12, 1996, expressly denied petitioners' motions for new trials.[10]

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981) does not support petitioners' contention that the Tenth Circuit was

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[10]Petitioners' motions for new trials were filed after the Tenth Circuit issued its opinions granting respondent judgment as a matter of law. The issue of a new trial in the event their evidence was found to be insufficient to support their verdicts was not raised in petitioners' answer briefs. Nowhere in their new trial motions did petitioners contend that the Tenth Circuit was required to explain its reason for denying them a new trial. See *Doan Petition for Rehearing With Suggestion of Consideration In Banc and Alternative Rule 50(d) Motion for New Trial, A-10-A-12; Furr Petition for Rehearing With Suggestion of Consideration In Banc and Alternative Rule 50(d) Motion for New Trial, A-14-A-16.* Petitioners, therefore, cannot raise this issue for the first time in their petition. See Kosak, 465 U.S. at 865 n. 3.

required to explain why their requests for a new trial were denied. Gulf does not set forth requirements applicable to orders addressing a new trial after the grant of appellate JMOL. Rather, Gulf dealt with a district court order issued under Rule 23 of the Federal Rules of Civil Procedure. In Gulf, this Court granted a writ of certiorari to determine the scope of a district court's authority to limit communications from named plaintiffs and their counsel to prospective class members during the pendency of a class action lawsuit. Id. at 91. It was in this context that the Court set forth guidelines for orders dealing with communications in class action lawsuits. Gulf, therefore, has no application to the instant case. Petitioners' request for certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 20, 1996

Appendix A - Relevant Portions of the Corrected Answer Brief Filed in the Tenth Circuit by Petitioner Doan

Appeal No. 95-6180
(From West. Dist. Okla. CIV-9-1210-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK L. DOAN,

Plaintiff/Appellee,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' CORRECTED ANSWER BRIEF

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November 8, 1995

Oral Argument Not Requested

* * *

3. - JMOL WAS PROPERLY DENIED

Assuming this issue can even be reached, Mr. Doan will address the standard for JMOL, the effect of evidence of pretext and the sufficiency of the evidence.

A. - The Standard For Judgment As A Matter of Law

The standard for judgment as a matter of law (JMOL) is set out in **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985) (JNOV):

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.**, 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.**, and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.**, 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

In the context of an employment discrimination case, evidence of pretext precludes reversal of a jury verdict. **Binder v. Long Island Lighting Co.**, 57 F.3d 193, 200 (2d Cir. 1995) (reversing JMOL because "a rational trier could easily have disbelieved [employer's] principal proffered justification".). Also see **Gaworski v. ITT Commercial Finance Corp.**, 17 F.3d 1104, 1109 (8th Cir. 1994):

> "[I]f (1) the elements of a prima facie case are present, and (2) there exists a sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding. . ."

In this case, the ultimate issue is the existence of an intention to discriminate. It must be remembered, however, that Mr. Doan brought two related but different claims. Under the ADEA "a basic finding of liability under the act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct." **Cooper v. Asplundh Tree Expert Co.**, 836 F.2d 1544, 1551 (10th Cir. 1988). In contrast, the Oklahoma public policy claim requires only proof that age was one 'significant factor'. **Tate v. Browning-Ferris, Inc.**, 833 P.2d 1218, 1230 n. 69 (Okla. 1992). "Under Oklahoma law, the 'determining factor' test is a more stringent test than the 'significant factor' test". **Bentley v. Cleveland County Board of County Com'rs**, 41 F.3d 600, 606 (10th Cir. 1994).

Mr. Doan will show that his evidence is sufficient under either standard.

* * *

Appendix B - Relevant Portions of the Corrected Answer Brief Filed in the Tenth Circuit by Petitioners Furr, Woosley and Ozinga

Appeal No. 95-6181
(From West. Dist. Okla. CIV-93-939-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT S. FURR, LESLIE WOOSLEY, AND BERNARD OZINGA,

Plaintiffs/Appellees,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' CORRECTED ANSWER BRIEF

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(405) 235-6100
Attorney for Appellees

November 1, 1995

Oral Argument Not Requested

* * *

3. - JMOL WAS PROPERLY DENIED

Assuming this issue can even be reached, Appellees will address the standard for JMOL, the effect of evidence of pretext and the sufficiency of the evidence.

a. - The Standard For Judgment As A Matter Of Law

The standard for judgment as a matter of law (JMOL) is set out in **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985) (JNOV):

> ". . .A judgment notwithstanding the verdict is appropriate only when 'the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made.' **Symmons v. Mueller Co.,** 493 F.2d 972, 976 (10th Cir. 1974). In making this evaluation, the court must construe the evidence and inferences most favorably to the nonmoving party, **id.**, and 'cannot weigh the evidence, consider the credibility of witnesses or substitute its judgment for that of the jury.' **Joyce v. Atlantic Richfield Co.,** 651 F.2d 676, 680 n.2 (10th Cir. 1981). '[S]ince the grant of such a motion deprives the nonmoving party of a determination of the facts by a jury, judgment notwithstanding the verdict should be cautiously and sparingly granted.' **Id.** at 680. . ."

In the context of an employment discrimination case, evidence of pretext precludes setting aside a jury's verdict. **Binder v. Long Island Lighting Co.**, 57 F.3d 193, 200 (2nd Cir. 1995) (reversing JMOL because "a rational trier could easily have disbelieved [employer's] principal proffered justification".). Also see **Gaworski v. ITT Commercial Finance Corp.**, 17 F.3d 1104, 1109 (8th Cir. 1994):

> "[I]f (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding. . ."

Furthermore, "statistical evidence [which shows] a significant association between age and discharge" coupled with other evidence is sufficient to prove age discrimination. **EEOC v. Prudential Federal Sav. and Loan Ass'n**, 763 F.2d 1166, 1171 (10th Cir. 1985).

In this case, Appellees brought two related but different claims. Under the ADEA "a basic finding of liability under the act requires that age be at least one of possibly several 'determinative factors' in the employer's conduct." **Cooper v. Asplundh Tree Expert Co.**, 836 F.2d 1544, 1547 (10th Cir. 1988). In contract, the Oklahoma public policy claim requires only proof that age was one 'significant factor'. **Tate v. Browning-Ferris, Inc.**, 833 P.2d 1218, 1230 n. 69 (Okla. 1992). "Under Oklahoma law, the 'determining factor' test is a more stringent test than the 'significant factor' test". **Bentley**

v. Cleveland County Board of County Com'rs, 41 F.3d 600, 606 (10th Cir. 1994).

Appellees will show that their evidence is sufficient under either standard.

* * *

Appendix C - Relevant Portions of the Alternative Rule 50(d) Motion for New Trial Filed in the Tenth Circuit by Petitioner Doan

Appeal No. 95-6180
(From West. Dist. Okla. CIV-93-1210-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JACK L. DOAN,

Plaintiff/Appellee,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION OF CONSIDERATION IN BANC AND ALTERNATIVE RULE 50(d) MOTION FOR NEW TRIAL

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May 31, 1996

* * *

ALTERNATIVE RULE 50(d) MOTION TO MODIFY THE MANDATE TO ALLOW CONSIDERATION OF NEW TRIAL IN LIEU OF JMOL

Under Rule 50(d), Fed.R.Civ.P., if JMOL is granted on appeal, the appellee may move for a new trial in lieu of judgment. Appellee may "seek rehearing from the court of appeals after his judgment has been reversed" to secure this relief. **Neely v. Eby Construction Co.**, 386 U.S. 317, 329, 18 L.Ed.2d 75, 84 (1967). **Neely** warned that "obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial which should more appropriately be addressed to the trial court." **Neely**, 386 U.S. at 325-26, 18 L.Ed.2d at 82-83.

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. * * * A plaintiff. . .may ask the trial judge [or appellate court] to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. . ." **Id.** 386 U.S. at 327-28, 18 L.Ed.2d at 83-84.

There are strong reasons why this request should be decided by the trial judge:

> "A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record. Thus. . .

> trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues 'in a perspective peculiarly available to him alone.'" Citations omitted.

Neely, 386 U.S. at 337, 18 L.Ed.2d at 89 (Black, J., dissenting). Cf., **Swearngin v. Sears, Roebuck & Co.**, 376 F.2d 637, 643 (10th Cir. 1967).

A new trial in lieu of JMOL is virtually mandatory when "the trial court itself caused the insufficiency in plaintiff-appellee's case". **Id.**, 386 U.S. at 327. Here, the trial court excluded Doan's statistical evidence and expert testimony, but because Doan prevailed it was not necessary to either claim error or seek a nonsuit to reformulate the evidence. Further, certain of the issues deemed critical on appeal (lack of a college degree, similarity in job duties) were not raised at trial and Doan has never been allowed an adequate opportunity to offer proof of pretext on these issues. Evidence is available as to performance appraisals, job duties, seniority or time in the group for other co-workers which would fill this Court's perceived gap in the evidence. Also evidence exists as to the exclusion of groups of younger employees from the RIF which, on a cumulative basis, adds to the conclusion that age was a determinative factor in Doan's termination.

As to the state law verdict, the Opinion, pg 2 fn 1, misunderstands Doan's position. Doan conceded that **List v. Anchor Paint Mfg Co.**, 910 P.2d 1011 (Okla. 1996) disallowed a **Burk** tort, but he also argued that the matter was not preserved for appeal. Since the issue was never briefed -- even on appeal -- Plaintiff has not been given the chance to urge

the existence of alternative state-law remedies arising from the same core facts.

CONCLUSION

Congress authorized jury trials in ADEA cases because a "jury may be more neutral" and "more likely to be open to the issues raised by the plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As suggested by the legislative history, this Court should defer to the collective wisdom of the jury who first hand observed the demeanor and manner of the witnesses. At the least, judgment should not be entered and a new trial should be allowed where Plaintiff may address the perceived gaps in this case.

* * *

Appendix D - Relevant Portions of the Alternative Rule 50(d) Motion for New Trial Filed in the Tenth Circuit by Petitioners Furr, Woosley and Ozinga

Appeal No. 95-6181
(From West. Dist. Okla. CIV-93-939-R)

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT S. FURR, LESLIE WOOSLEY, AND BERNARD OZINGA,

Plaintiffs/Appellees,

- versus -

SEAGATE TECHNOLOGY, INC.,

Defendant/Appellant.

APPELLEES' PETITION FOR REHEARING WITH SUGGESTION OF CONSIDERATION IN BANC AND ALTERNATIVE RULE 50(d) MOTION FOR NEW TRIAL

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May 31, 1996

* * *

ALTERNATIVE RULE 50(d) MOTION TO MODIFY THE MANDATE TO ALLOW CONSIDERATION OF NEW TRIAL IN LIEU OF JMOL

Under Rule 50(d), Fed.R.Civ.P., if JMOL is granted on appeal, the appellee may move for a new trial in lieu of judgment. Appellee may "seek rehearing from the court of appeals after his judgment has been reversed" to secure this relief. **Neely v. Eby Construction Co.**, 386 U.S. 317, 329, 18 L.Ed.2d 75, 84 (1967). **Neely** warned that "obviously judgment for defendant-appellant should not be ordered where the plaintiff-appellee urges grounds for a nonsuit or new trial which should more appropriately be addressed to the trial court." **Neely**, 386 U.S. at 325-26, 18 L.Ed.2d at 82-83.

> "[W]here the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. * * * A plaintiff. . .may ask the trial judge [or appellate court] to grant a voluntary nonsuit to give plaintiff another chance to fill a gap in his proof. . ." **Id.** 386 U.S. at 327-28, 18 L.Ed.2d at 83-84.

There are strong reasons why this request should be decided by the trial judge:

> "A trial judge who has heard the evidence in the original case has a vast store of information and knowledge about it that the appellate court cannot get from a cold printed record. Thus. . .

> trial judge can base the broad discretion granted him in determining factual issues of a new trial on his own knowledge of the evidence and the issues 'in a perspective peculiarly available to him alone.'" Citations omitted.

Neely, 386 U.S. at 337, 18 L.Ed.2d at 89 (Black, J., dissenting). Cf., **Swearngin v. Sears, Roebuck & Co.**, 376 F.2d 637, 643 (10th Cir. 1967).

A new trial in lieu of JMOL is virtually mandatory when "the trial court itself caused the insufficiency in plaintiff-appellee's case". **Id.**, 386 U.S. at 327. Plaintiffs relied on **Anderson v. City of Albuquerque**, 609 F.2d 796 (10th Cir. 1992) and the trial court's rulings in formulating their statistics. Similarly, Plaintiffs relied on **Bell v. AT&T**, 946 F.2d 1507 (10th Cir. 1991) in believing it was Seagate's burden to explain why groups of younger employees were excluded from the RIF.

It would be manifestly unfair to deny Appellees, who received a favorable jury verdict, the opportunity to fill in gaps in their evidence. Had the trial court, for instance, excluded the statistics which Plaintiffs offered, the trial court could also have allowed Plaintiffs an opportunity to reformulate those statistics. Had Defendant offered explanations for its exclusion of younger groups from the RIF as, for example, on difference in functions or assignments of those groups, Plaintiffs could have -- even during the prior trial -- presented additional evidence challenging such explanations as pretextual.

As to the state law verdict, the Opinion, pg 2 fn 1, misunderstands Plaintiffs' position. Plaintiffs conceded that **List v. Anchor Paint Mfg Co.**, 910 P.2d 1011 (Okla. 1996) disallowed a **Burk** tort, but they also argued that the matter was

not preserved for appeal. Since the issue was never briefed -- even on appeal -- Plaintiffs have not been given the chance to urge the existence of alternative state-law remedies arising from the same facts.

CONCLUSION

Congress authorized jury trials in ADEA cases because a "jury may be more neutral" and "more likely to be open to the issues raised by the plaintiffs" than a judge. 123 Cong.Rec. 34318 (1977). As suggested by the legislative history, this Court should defer to the jury who observed the demeanor and manner of the witnesses. At the least, a nonsuit should be allowed so that Plaintiffs may address the perceived gaps in their case.

* * *